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IN THE

Supreme Court of the United States

October Term, 1979
No. 79-1348

WORLDWIDE CHURCH OF GOD, INC., *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District, Division Three.

Motion for Leave to File Brief Amicus Curiae and Brief of Church of The Nazarene as Amicus Curiae in Support of Granting Certiorari.

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Pursuant to Rule 42 of this court, the following organization respectfully moves for leave to file a brief amicus curiae in support of granting a writ of certiorari in this matter.

The Church of the Nazarene is a Missouri, non-profit Corporation organized as the ecclesiastical headquarters of over 4,831 individual Church Congregations within the United States, and in particular, within the State of California, comprised of over 473,726 persons. The Church of the Nazarene is keenly interested in any activity which affects the free exercise of religious belief and practice.

Consent to File This Brief of Amicus Curiae Was Requested of the Parties but Not Received.

This moving party requested permission of the parties to this matter to file a brief amicus curiae in connection with the petition for a writ of certiorari. Petitioners gave their consent, but Respondent, State of California, declined to do so. Accordingly this motion is submitted.

The Attached Brief Describes the Significance of the Instant Case and the Consequences of the Issues It Presents.

The moving party has filed this brief because of an apprehension that the adverse resolution of the issues presented here would pose a grave threat and perhaps irreparable damage to the free expression of religious belief and practice in the United States.

The Church of TheNazarene interprets the charitable trust theory underlying the Attorney General's case and the discovery orders described in the petition to constitute a direct challenge to the separation of Church and State mandated by the First Amendment to the Constitution.

Amicus is not a party to any of the actions involved in the petition before the Court nor involved in any of the activities alleged by the respondent, State of California, to constitute wrongdoing on the part of the petitioners. Amicus is in a position, because of its independent status, to present to the Court an objective and knowledgeable point of view to aid it in considering the important issues presented by the petition.

This action directly affects Churches and religious organizations of every kind. The moving party believes that its points of view as a Church affords a relevant reference in assessing the fundamental constitutional issues presented to the Court.

For the foregoing reasons, this moving party urges the Court to permit it to file the accompanying amicus curiae brief and thereby to urge upon this Court that it grant the petition for a writ of certiorari.

Respectfully submitted,

BROWN AND REED, INC.,

BY STEPHEN W. REED,

Attorney for Amicus Curiae.

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Brief of Church of The Nazarene as Amicus Curiae in Support of Granting Certiorari.

Introduction.

The defendants in the captioned case have filed with the Court a petition for a writ of certiorari to the California Court of Appeal. The Church of The Nazarene, as Amicus Curiae strongly supports this petition and urges that it be granted.

Amicus shares the alarm of others who have filed Motions as Amicus Curiae at California's Public Trust Doctrine[1], as it purports to apply common law trust principles to all

[1]Motion for Leave to File Brief Amicus Curiae and Brief of American Civil Liberties Union of Southern California, *et al.*, Page 2.

churches, whether organized under California statutory law or not.

Each Amicus interprets the Attorney General's theory as a direct attack at organized religious expression and the freedom of association. The Court is thus presented the question of the constitutional limits on the scope of the Public Trust Doctrine advanced by the State of California.

Statement of the Case.

The description of the facts of this case has been thoroughly stated by Petitioner and other Amici. For the sake of brevity, Amicus will adopt, in pertinent part, the Statement of National Council of Churches of Christ in the U.S.A., *et al.*, as follows:

The Attorney General of California, acting for the state, has declared that churches and religious organizations are public, charitable trusts accountable to the state and consequently, that:

1. All church or synagogue property is deemed to be public property, rather than being owned by the church for synagogue or its members, and is therefore subject to supervision, regulation and control by the state;

2. All church or synagogue records are public records and are subject to audit and review by the state, whether or not there is reasonable ground for its action;

3. The state may, with or without cause, compel a church or synagogue to account for all of its income and expenditures so that the state may determine if its funds are being used for proper religious purposes;

4. Church or synagogue officials are public trustees who serve as agents of the state and may be removed and replaced by the state at will;

5. The state has the authority to require the reorganization of internal church structures from hierarchical to congregational form;

6. The state may appoint a receiver to take possession of all church or synagogue property and records and supervise operations until the litigation is finally determined, no matter how long that may take; and

7. The state may conduct ongoing investigation as a means of accomplishing all or any of the foregoing objectives.

Questions Presented for Review.

Does the Charitable Trust theory, as applied to churches and other religious organizations entangle the affairs of the State with those of a church and/or result in the establishment of a church or state religion as proscribed by the First Amendment?

May the State of California, consistent with the First Amendment, disregard the religious character of an established church, and because it is incorporated as a nonprofit corporation under state law, treat it as a charitable or public trust and establish the following relationship with and involvement in church affairs:

1. All church property is deemed owned by the People of the State not the church or its members and is subject to supervision, regulation and control by the State;

2. All church records are public records and are subject to audit and review by the State;

3. The state may compel the church at any time to account for all of its income and expenditures so the State may determine if church funds are being used for proper religious purposes;

4. Church officials are public trustees who serve and may be removed and replaced by the State;

5. May the State reorganize church structure from hierarchical to congregational form.

Statutory and Constitutional Provisions Involved.

The rights asserted by Petitioners arise under the Religion Clauses of the First Amendment of the United States Constitution as applied to the states by virtue of the Fourteenth Amendment.

ARGUMENT.

I.

California's Public Trust Doctrine Impermissibly Trenches on the Free Exercise of Religious Practice and Association.

A. Churches Are Different From Other Non-Profit Corporations.

The First Amendment begins with the language: "Congress shall make no law abridging . . ."[2] There follows a list of rights guaranteed to the people of this country considered by many to be the paramount marks of a free people: The right of free exercise of religious belief and exemption from the establishment of a state-sponsored church; freedom of speech and the press; right of peaceable assembly; and petition for redress of grievance.

Two of these paramount guarantees are in issue before this court: The right of free exercise of religious freedom and the right of peaceable assembly—the freedom of association.

Expression of religious belief involves the absolute freedom to believe, and also the freedom to put belief into action. Though not absolute, this right of action may be limited only in response to a compelling interest.[3] But belief and action are inextricably bound. If one is prohibited (or merely discouraged) from putting belief into action, the promise of the First Amendment is, indeed, hollow.

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[2] *Smith v. California*, 361 U.S. 147 (1959).

[3] *Sherbert v. Verner*, 374 U.S. 398, 403, 10 L.Ed.2d 965, 969-70, 83 S.Ct. 1790 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 229-30, 32 L.Ed.2d 15, 32-33, 92 S.Ct. 1526 (1972); *McDaniel v. Paty*, 435 U.S. 618, 631 n.2, 55 L.Ed.2d 593, 604, n.2, 98 S.Ct. 1322 (1978) (concurrence of Brennan, J.).

Other Amici[4] have noted that by declaring every charitable organization to be a public trust and every church to be a charitable organization, every church becomes, *ipso facto*, a public trust, accountable to the State as guardian of the public interest. Is the power claimed by the Attorney General to *remove* church officers substantively different than the proscribed power to appoint them?[5] The Attorney General's theory proceeds on the unfounded assumption that there is no difference between religious non-profit corporations (churches, etc.) and charitable non-profit corporations.

B. The Charitable Trust Theory Necessarily Inhibits Religious Freedom of Association.

The Attorney General has sought, as part of his requested discovery, the names of all recipients of gifts from the church over the past decade, sources of loans and other finances, the names of persons receiving aid from the church and numerous other written materials dealing with the internal operation of the church, its ministers, and laity.[6]

It is difficult to conceive a more intrusive method for the "control" of a group dissident or otherwise than the revelation of membership lists, records of donors and beneficiaries of the Church's gifts. The intimidating effect of such disclosure is surely clear to any person benign or diabolical interested in controlling or affecting the associations of persons and groups. This Court has dealt harshly with such conduct in the secular realm. *NAACP v. Alabama*, 357 U.S. 449, 462, 2 L.Ed.2d 1488, 1499-500, 78 S.Ct. 1163 (1958); *Buckley v. Valeo*, 424 U.S. 1, 64-66, 46 L.Ed.2d 659, 713-

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[4]Brief of American Civil Liberties Union of Southern California, *et al.*, page 12.

[5]*Cf. Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952).

[6]*Cf.* §§7240 and 9230.

14, 96 S.Ct. 612 (1976).[7] It is a short step from "discouraging" persons from associating with an organization by means of public disclosure to outlawing association altogether! Freedom from such intimidation is at least as important in the realm of religious expression as in the secular. One might ask reasonably whether the members of a church are less entitled to privacy and freedom of association than members of a secular group.

II.

California's Public Charitable Trust Doctrine Involves an Impermissible Entanglement of Church and State.

The California Attorney General seeks to classify all religious organizations as public charitable trusts for the benefit of all the people of the state. This he may not do! California "cannot make public business of religious worship."[8] If evidence is required to establish the unhealthy entanglement of church and state proposed by the Attorney General, one need look only to the suggestion that the church, being merely a ward of the State needs no defense; needs no representation; indeed, should welcome the embrace of the Attorney General, its keeper and guardian.[9]

An unnatural entanglement of the State of California with the affairs of religious organizations is inherent in the Attorney General's Charitable Trust Doctrine. The conflict is

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[7]See also, *Gibson v. Florida Investigation Committee*, 372 U.S. 539, 543-45, 556-58, 9 L.Ed.2d 929, 934-35, 941-42, 83 S.Ct. 889 (1963) and *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 77-78 (1st Cir. 1979).

[8]*Lemon v. Kurtzman*, 403 U.S. 602, 633, 29 L.Ed.2d 745, 767, 91 S.Ct. 2105 (1971).

[9]Page 13, Transcript January 10, 1979 Hillel Chodos, Special Deputy Attorney General appearing before Judge Title: "No. I don't think the Church has a single interest that needs counsel before Your Honor. In my view, the Church ought to welcome the supervision of the Court."

inevitable. It is well established that the religious freedom guaranteed under the First Amendment has nothing to do with reasonableness of belief so long as the act or refusal to act derived from such belief are not directly harmful to the public.[10] The Charitable Trust theory will always conflict with First Amendment freedoms because it will always impose a "reasonableness" test on the expression of belief wherever the property, funds or assets of a church are involved. Such a dispute lies at the heart of the instant action. The Attorney General has alleged misuse and waste of church assets. (Second Amended Complaint, Paragraphs 12, 21, 37 and 40). The Defendants, to the extent they have answered the allegations of the Attorney General, have alleged that the expenditure of church funds charged by the Attorney General as improper, constitute, to a large measure, the practice of the religious belief of the church. The issue, therefore, is squarely drawn: Does the California Attorney General have the authority, by common law or otherwise, to second-guess the ecclesiastical decisions of the leadership of the Worldwide Church of God, or any other church simply because it involves the expenditure of funds, the purchase or sale of property, or the making of gifts?

Inherent in the charge that the leaders of the Worldwide Church of God have misused church assets and are removable at the will of the Attorney General is the notion that the Attorney General of the State of California is better

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[10]*Bolling v. Superior Court*, 16 Wash.2d 373, 133 P.2d 803 (1943).

equipped to judge between uses of church property.[11] The Court is, therefore, presented with the spectre of an officer of the State of California deciding whether gifts to widows and orphans are "better" (or worse) than the construction of new church facilities; whether the donation of gifts as part of the ministry of the church are better (or worse) than the establishment of new churches; whether the payment of salaries to leaders of the church is better (or worse) than the support of missionaries; whether the creation of missionary facilities is better (or worse) than the collection of food for the poor; whether the collection of food for the poor is better (or worse) than the training of new ministers of the gospel.[12] The absurdity of such a proposition is patent. Yet, that is specifically inherent in the proposition advanced by the California Attorney General.

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[11]*Cf. Walz v. Tax Commission*, 397 U.S. 664, 675 (1970) — The question is "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglment."; *Presbyterian Church in the U.S., et al. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church et al.* 393 U.S. 440. The court there flatly rejected the "departure-from-doctrine" approach advanced by the State of Georgia on the ground that it necessarily involved the state in determinations of doctrine which were forbidden by the First Amendment. It is impossible to separate the reach of California's "charitable trust" doctrine from Georgia's discredited "departure-from-doctrine" theory. By what standard will the Attorney General *measure* the degree to which a church has fulfilled (or departed from) its purposes? The Articles of Incorporation of the Worldwide Church of God, appended to the Attorney General's Complaint, clearly describe the *purpose* of the Defendant: "(a) To proclaim the Gospel of Jesus Christ . . . to assemble ourselves together in worship of Almighty God . . ." If a church expends money—or sells or buys property as part of its proclaimation of the gospel, how is the State to judge? For the Attorney General to essay to evaluate the performance of the Church in achieving that purpose inevitably involves him in the process of weighing one ecclesiastical decision against another.

[12]*Cf. Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) where this Court frankly rejected the idea that, by statute, the State of New York might regulate the selection of an archbishop of the Russian Orthodox Church.

III.
California Has Failed to Show a Compelling Need for Such Intrusion in the Affairs of a Church.

It is doubtless the law that a government may *not* restrict expression or exercise of religious belief.[13] It seems equally clear that the burden of proving the existence of facts sufficient to show that compelling interest rests squarely on the State.[14] As of the date of this brief, the record is devoid of any evidence suggesting that the State of California has a compelling interest in the affairs of the Worldwide Church of God. The record, however, is equally clear that the cost to the Worldwide Church of God and to all of the amici and others, as yet unrepresented, resulting from the intrusion of the State of California is immense. The very possibility of these kinds of proceedings imposes a grave chill on the practice of religion. What church or organized religious body can now ignore safely the possibility that its policies, its polity, its ecclesiastical structure, or its very beliefs will be the subject of the next "examination" by the California Attorney General?[15] What is there that is sacrosanct within the practices of any of your Amici which is not equally sacrosanct within the practice of the Worldwide Church of God?

California is not powerless to control any activity undertaken in the name of religion. As this Court observed in *Sherbert v. Verner*, 374 U.S. 398, 403, 10 L.Ed.2d 965, 970, 83 S.Ct. 1790 (1963), the right to act must give way to circumstances of compelling interest, as in the case of

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[13] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).
[14] *Everson v. Board of Education*, 330 U.S. 1 (1946).
[15] *Cf. Younger v. Faith Center, Inc.*, Case No. C254329 (Superior Court of the State of California for the County of Los Angeles) Appeal pending in California Court of Appeal for the Second Appellate District, 2d Civil No. 56574.

conduct that "pose[s] some substantial threat to public safety, peace or order." Unquestionably, individual criminal conduct may be prosecuted and punished as such regardless of that fact that it may have been religiously inspired.[16]

In *United States v. Ballard*, 322 U.S. 78 (1944), the Court with only one dissenter, held that no agency of government has constitutional competency to pass upon the validity of religious profession even when prevention of fraud is asserted to justify its intervention. In language particularly applicable to the present case, the Court there said (at pages 86-87):

> "Hearsay trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because of a jury in a hostile environment found those teaching false, little indeed would be left of religious freedom. . . . The Religious views espoused by respondents might seem incredible, if not prepos-

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[16] *Davis v. Beason*, 133 U.S. 333, 341-42, 33 L.Ed. 637, 639-40, 10 S.Ct. 299 (1890). It is instructive to observe that the individual defendants have repeatedly urged the California Attorney General to prosecute them criminally if he can. He has not done so to date!

terous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.''

We may ask reasonably, therefore, What *is* the compelling need? The answer appears to be: None!

IV.

California's ''Public Trust'' Doctrine by Its Very Terms Constitutes an Establishment of Religion.

The Second Cause of Action of the State's Complaint seeks the removal of certain officers and directors of the Church and their replacement with others more satisfactory to the Attorney General. This is surely the precise behavior proscribed by the ''establishment'' clause of the First Amendment, and by this Court in *Kedroff v. Saint Nicholas Cathedral* 344 U.S. 94, (1952).

The logic of the Attorney which compels accounting, disclosure, and authorizes the supervision and removal of officers, directors and leaders of the church surely also compels an authority to establish a church.

It appears that the California Attorney General is, in fact, willing to extend his Charitable Trust Doctrine to its logical conclusion. Among the ''logical'' conclusions to which the Charitable Trust Doctrine has been drawn is the notion that because the officers and directors of the church are mere trustees of a public trust, the Church itself has no legitimate expectation of privacy, property rights, or proprietary interests in its assets, books and records. Assuming *arguendo* that the officers and directors of any corporation—religious or otherwise—have no reasonable expectation of property rights in the assets of the Corporation solely by reason of their directorates or officerships, it does not follow that the

organization, itself, has no similar rights or reasonable expectations. It is worthy of note that the Worldwide Church of God is a named defendant in this action. Its corporate rights, expectations, and those of its members are blithely ignored by the righteous sweep of the California Attorney General's proposed discovery. Other amici have suggested that the California Attorney General has ample tools available to him for the prosecution of miscreance if, in fact, evidence of criminal behavior can be found.[17] But the State's complaint attacks the church with the corollary argument that its acts, its policies, its polity, and, ultimately its ecclesiastical structure, are subject to review, approval and modification of the California Attorney General. That is surely not the law and is equally surely contrary to the First Amendment.

This Court has previously stated: ''The general principle deducible from the First Amendment is this: that we will not tolerate either governmentally established religion or governmental interference with religion.'' [*Walz v. Tax Commissioner* 397 U.S. 664 (1970)].

The Attorney General has set out a course, the end of which can only be the establishment of a church patterned after his notions of what a church should be.[18] The State does not say *how* one will be able to separate the financial

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[17]Motion For Leave to File Brief Amici Curiae and Brief of American Civil Liberties Union of Southern California, *et al.*, pages 21-22.

Second Amended Complaint, Pargraphs 22 and 25. Cf. The clear prohibition against the operation of a religious school by the State, *National Labor Relations Board v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

[18]Second Amended Complaint, Paragraph 25, which provides, in pertinent part: ''(a) The Church . . . should be required to select a board of directors . . . authorized and empowered to oversee and supervise its financial affairs (as distinguished from its ecclesiastical or spiritual affairs) . . .''

from the ecclesiastical and spiritual affairs of the church.[19] Your Amicus suggests that the Attorney General must, perforce, engage in prohibited review and evaluation of ecclesiastical and spiritual affairs *first* in order to determine whether he is regulating only financial affairs or has crossed into the prohibited realm.

Other amici have correctly noted that when the State, whether through the Attorney General or a court, is empowered to decide for itself what is or is not ecclesiastical and to determine finally whether the manner in which a church performs its religious mission is in conformity with "the general purposes for which it is formed,"[20] that entanglement is exalted to a doctrinal level, and the very inquiry which the Court has characterized as "impermissible"[21] becomes sanctified.[22]

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[19]In *Everson v. Board of Education,* 330 U.S. 1, 15 (1947), and later cases, *McCollum v. Board of Education*, 333 U.S. 203, 210-211 (1948); *McGowan v. Maryland*, 366 U.S. 420, 430 (1961); *Torcaso v. Watkins*, 367 U.S. 488, 493 (1961), the Court defined the establishment clause in the following language:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organization or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

[20]*Cf.* former Cal. Corp. Code §9505 (West, 1979).

[21]*NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502, (1979).

[22]Brief of American Civil Liberties Union of Southern California, page 16.

Conclusion.

The Charitable Trust Theory of the California Attorney General appears as an engine of destruction to the expression of freedom of religion in the United States, and the right of Association. It seems unlikely that the Attorney General can be trusted to restrict voluntarily the scope and the application of this theory as it affects religious organizations. For that reason, amicus believes it is imperative that this Court grant the Petition for Certiorari in order to permit full and complete argument of these issues and, in particular, to defined the legitimacy, if any, of the theory of public charitable trusts espoused by the Attorney General.

Respectfully submitted,

BROWN AND REED, INC.,
By STEPHEN W. REED,
Attorney for Amicus Curiae.